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Let's chat

A lawyer's EOFY consideration – April 2023

With:

Darius Hii – Tax and estate planning lawyer; Chartered Tax Advisor; and Director at Chat Legal

Information provided is general in nature; precise application depends on specific circumstances



Expectations

- A legal approach to compliance and 30 June considerations
- Not a be all end all summary of an accountant's checklist



Backdating

- Dating a document prior to the date of execution:
 - Replacing a lost agreement
 - Recording of prior agreement
 - Other reasons (fraudulent)
- Consider the evidence:
 - Historical transactions
 - Any documentation provided or lodged that supports or contradicts intention
 - 'Metadata'
- Contemporaneous is best



Backdating

- Replacing a lost agreement:
 - Only possible if it is an exact copy and same witnesses are present.
 - **Not okay** if additional terms included in newer document executed
 - **Not okay** if original terms are unknown
 - When buying documents online beware the 'copyright' date on the front page
- Recording of prior agreement
 - Generally not preferable as often the written agreement contains more provisions than the oral agreement
 - Where significant time has passed, questions whether same agreement or new agreement exists in entering into the new agreement
 - Preferred to **date today** but acknowledge in terms that terms apply beforehand
 - Compare a trust established on 1 July 2022 but only executed on 10 July 2022 (but dated 1 July 2022) with a trust established on 1 July 2022 but executed and dated on 10 July 2022 with the terms of the trust acknowledging the intention as of 1 July 2022



Backdating

- Effectiveness of backdating:
 - All parties consent – possible provided written document reflects the agreement at the time and evidence can support
 - *McDonald v Federal Commissioner of Taxation* [2001] FCA 305 – where contract of sale only enforceable from time written contract signed and exchanged
 - Contrast with *Gardiner v FC of T* [2020] EWHC 2334 where sale of land enforceable before contact due to written communication between solicitors of the parties outlining the essential terms of the sale and appropriate offer and acceptance
 - Also note *Dickenson v Gross* (1927) 11 TC 614 where partnership agreement not effective as evidence was contrary to written agreement
 - Without consent – unlikely to be valid (hence why there are deeds of rectification etc. for lost trust deeds)
 - Backdated documents do not need to be followed by third parties.
 - Note the point that such agreements are often between parties to the document and do not necessarily bind third parties
 - Consider the time differential and evidence on hand.



Backdating

- Some documents must be in writing:
 - Property contracts
 - Trustee discretion (subject to the terms of the trust deed)
 - Trust changes (subject to the terms of the trust deed)
 - Tax elections
- But who would know?
 - Email/written communications
 - Meta data
 - Font
 - Technological features
 - Establishment of entities
 - Copyright
 - Prior lodged documentation
- Beware the datamatching



Backdating

- Confirmation and acknowledgements
- Minutes/resolutions
- Ratification
- Earlier effective date documents



Backdating – elections

- FTE/IEE – allows a prior income year date to be picked
- Consolidation – can have retrospective effective to the beginning of the income year which the choice relates
- Some rollover/concessions automatically apply, but others require an election by the time the taxpayer lodges its income tax return for the income year which the relevant CGT event happened or some other certain date – e.g. Div 122, 124, 152, 328-G, 615; and sections 40-340(3) (balancing adjustment events for depreciating assets), 70-100 (trading stock related), 290-170 (concessional contributions), 292-100 (regarding 15-year small business CGT exemption or the small business retirement exemption)



Backdating – trust distributions

- If no distribution by 30 June, beware:
 - Earlier determination date required
 - E.g. 29 June
 - Default definition of income of the trust (distributable income)
 - E.g. Income is according to ordinary income.
 - Default beneficiaries
 - Written consent
 - 3 day written notice to principal
 - 7 day written notice of trustee exercising income power to appointor



Forward dating

- No issue
- Note conditional requirements if not effective until a later date
 - Share transfers/sale agreements
 - Unit transfers/sale agreements



Record keeping

- Rule of thumb – 5 years
- CGT requires as long as required to support future calculation
- Corporations law requires:
 - Resolutions/minutes to be recorded within 1 month
 - Financial records kept for 7 years
 - Includes invoices receipts, documents of prime entry and working papers
 - *Are company records being kept appropriately (i.e. member register being updated contemporaneously)*



Documenting of journal entries

- Journal entries do not equal proof of transaction
- Documents prove transactions
- Dividend declaration/trustee minutes/offset deeds required and contemporaneous
- Note for dividends:
 - Corporations law complied with and formal processes followed
- "It was too hard to do it by 30 June" or "You don't understand the real world" – not an excuse



PSI

- Is the individual an employee?
 - Yes – declare income with individual
 - No – continue to next question
- Is the income of the taxpayer PSI?
 - Yes – continue to next question
 - No – PSI rules do not apply
- Is the taxpayer a PSB?
 - Yes:
 - Review arrangements and retain appropriate evidence
 - Require reasonable arguable position paper
 - Continue to next question
 - Review on an annual basis
 - No – PSI rules apply



PSI

- Consider Part IVA risk.
 - If want to consider – continue to next question on ATO issued guidance
 - If client ‘does not care’ – scope out and qualification
- Does the taxpayer wish to be considered low-risk?
 - Yes:
 - Fall within 2 ‘gateways’ – ‘commercial driver’ and ‘no high risk features’
 - Analyse based on table
 - No
 - Warn client of risks
 - Either scope out work or undertake Part IVA analysis of factors
 - Either options:
 - PCG 2021/4 confirms Part IVA determination requires an analysis of Part IVA factors



PSI – Part IVA

- Part IVA factors:
 - Is there a scheme
 - A tax benefit is obtained
 - The dominant purpose for entering into the arrangement was to obtain the tax benefit
- Subfactors to consider:
 - Manner in which scheme entered into or carried out
 - Form and substance of the scheme
 - Time at which the scheme was entered into and the length of the period during which the scheme was carried
 - Result in relation to the operation of what would be achieved by the scheme
 - Any change of financial position of the taxpayer and related entities



PSI – Part IVA

- Use of discretionary trust and company with discretionary trust shareholders:
 - Consider impact if Part IVA succeeded for legitimate PSI businesses operating through structures
- PSI/wages being considered as business income to reduce tax liability?
 - Consider the facts
 - Sale of goods
 - Business structure
 - Goodwill, IP, expertise, size
 - Billables, referrals, template documents



'Foreign person'

- FIRB:
 - Foreign person is any individual not ordinarily resident
 - Australian citizens living overseas may be a foreign person for 'FATA'
 - There are some persons who may be excluded from having to obtain approval through FIRB
 - Such persons are listed in the Foreign Acquisition and Takeovers Regulation
 - Such Regulations **do not** affect the definition of a Foreign Person.
 - Such regulations provides an exemption by Foreign Persons with a close connection to Australia from having to apply to FIRB
- NSW Duties Act:
 - Foreign person is the same as FIRB definition but **excludes Australian citizens or a New Zealand citizen holding a special category visa**
 - NB recent news regarding certain Countries disputing NSW surcharge

Trust to foreign trust distributions



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Despite anything to the contrary in this deed, if any of the Secondary Beneficiaries or Tertiary Beneficiaries are foreign persons within the meaning of the *Foreign Acquisitions and Takeovers Act 1975* (Cth) the percentage of the Net Income in any year or capital at any time that the Trustee may Distribute to any one of those Beneficiaries or any two or more of them must not exceed the maximum percentage that the Trustee can Distribute without breaching that Act.

Trust to foreign trust distributions



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Item 9 – Excluded Beneficiaries

Notwithstanding any other clause in this document, the Trustee excludes any persons from being a Beneficiary of this Trust which would cause the Trust to be liable for:

- lodging an application required under the *Foreign Acquisitions and Takeovers Act 1975* (Cth);
- any 'foreigner' surcharge under any duty or land tax legislation in Australia; and
- any 'vacancy' fee under any State or Federal legislation.

The term 'foreigner' in this clause should be used to include (but not limited to) references to terms such as 'foreign person', 'foreign purchaser' and 'absentee person' in the respective legislation and should be interpreted in a broad manner to ensure no additional surcharges or processes are required from this Trust that would not be required from any other Trust which would not have had any other legislation applying to it.

This paragraph and the above paragraphs must not be varied while any property of the Trust includes an interest in real estate (including without limitation as purchaser under a contract of sale) in Australia or for a period of three years following the sale or disposal of an interest in real estate.

Trust to foreign trust distributions



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- 2.9 For clarity, the Trustee must not make a distribution or do any other action which would cause the Trustee of the Trust to be a:
- (a) foreign person for the purposes of the following legislation:
 - (i) *Duties Act 2001* (Qld);
 - (ii) *Duties Act 1997* (NSW);
 - (iii) *Land Tax Act 1956* (NSW); or
 - (iv) *Duties Act 2001* (TAS);
 - (b) foreign purchaser for the purpose of the *Duties Act 2000* (Vic); or
 - (c) trustee of a foreign trust for the purposes of the *Stamp Duties Act 1923* (SA).
- 2.10 Clauses 2.8 and 2.9 are irrevocable and must not be varied by the Trustee.

Trust to foreign trust distributions



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Excluded Person means the following (even if any of them is named or would otherwise be or be included in a class of Beneficiary):

- (a) each person named or described in Item 14 in the Schedule or nominated by the Trustee to be an Excluded Person;
- (b) the Settlor and any Child of the Settlor who is at the relevant time under the age of 18 years;
- (c) any corporation in which a person in (a) or (b) above is a director or member or in which any of them has a beneficial interest in any share;
- (d) any trust in which a person in (a) or (b) above has a beneficial interest whether vested, contingent or otherwise; and/or
- (e) any Foreign Person;

Foreign Person means:

- (a) a foreign person for the purposes of Chapter 4 of the Duties Act 2001 (Qld);
- (b) a foreign person or a foreign trust for the purposes of Chapter 2A of the Duties Act 1997 (NSW);
- (c) a foreign natural person, a foreign corporation or a foreign trust as defined in section 3 of the Duties Act 2000 (Vic);
- (d) a person holding a controlling interest in a foreign corporation or a substantial interest in a foreign trust for the purposes of sections 3A and 3B of the Duties Act 2000 (Vic) respectively;
- (e) an absentee person as defined in section 3 of the Land Tax Act 2005 (Vic);

- (f) an absentee person holding an absentee controlling interest in a corporation for the purposes of section 3A of the Land Tax Act 2005 (Vic) (unless an exemption under section 3B of that Act applies);
- (g) any potential Beneficiary of this Trust who would or might cause this Trust to be or become a foreign person or a foreign trust for the purposes of any of the above provisions;
- (h) any potential Beneficiary of this Trust who would or might cause this Trust to be or become a foreign person or a foreign trust for the purposes of any other statute,

and who, by being a Beneficiary, would or might cause this Trust to be assessed to additional or increased duty or land tax (in excess of any amount which the Trust would be required to pay had the person, corporation or trust not been so classified) in respect of the acquisition or holding of any direct or indirect interest in real property to which any of the provisions above apply, but only while:

- (i) the foreign person, corporation or trust continues to be so classified under the relevant provision; and/or
- (j) the Trust acquires or holds any direct or indirect interest in real property to which any of the provisions above apply;

and **Beneficiary** means any of them. The expression excludes all Excluded Persons;

Trust to foreign trust distributions



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21. Exclusion of Settlor and Prohibited Beneficiaries

Notwithstanding anything else in this Trust, no power conferred by this Trust shall be exercisable, and no provision shall operate, so as to allow Trust Property or its income to revert to or be held in trust for, or become payable to or applicable for the benefit of, the Settlor or any Person claiming under or in right of the Settlor, or a Prohibited Beneficiary, in any circumstances whatsoever.

(14) **Prohibited Beneficiaries** means any Person that is:

- (a) a "foreign natural person", a "foreign corporation" or a trustee of a "foreign trust" as defined in the *Duties Act 2000* (Vic); or
- (b) a "foreign person" or a "foreign trustee" as defined in the *Duties Act 1997* (NSW); or
- (c) a "foreign person" as defined in the *Foreign Acquisitions and Takeovers Act 1975* (Cth); or
- (d) a "foreign person" as defined in the *Duties Act 2001* (Qld); or
- (e) a "foreign person", a "foreign trust" or a "wholly foreign owned corporation" as defined in the *Stamp Duties Act 1923* (SA); or
- (f) a "foreign person" as defined in the *Duties Act 2008* (WA); or
- (g) a "foreign person" as defined in the *Duties Act 2001* (Tas);

Trust to foreign trust distributions



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1.18 'Foreign Person' means:

1.18.1 a 'foreign person' as defined in:

- (a) the *Duties Act 1997 (NSW)* and the *Land Tax Act 1956 (NSW)*;
- (b) the *Duties Act 2001 (QLD)* and the *Land Tax Act 2010 (QLD)*;
- (c) the *Stamp Duties Act 1923 (SA)*;
- (d) the *Land Tax Act 2004 (ACT)*;
- (e) the *Duties Act 2001 (TAS)*;
- (f) the *Duties Act 2008 (WA)*; and

1.18.2 a 'foreign trustee' as defined in the *Duties Act 1997 (NSW)*; and

1.18.3 a trustee of a 'foreign trust' as defined in the *Stamp Duties Act 1923 (SA)*; and

1.18.4 a 'foreign purchaser' as defined in the *Duties Act 2000 (VIC)*;

1.18.5 a 'foreign natural person', a 'foreign corporation' and the trustee of a 'foreign trust' as these terms are defined in the *Duties Act 2000 (VIC)*;

1.18.6 an 'absentee person' as defined in the *Land Tax Act 2005 (VIC)*; and

1.18.7 any individual, entity or other body or class of individuals, entities or other bodies expressly and irrevocably added as a Foreign Person in accordance with this Deed from time to time,

and for the avoidance of doubt, this definition of Foreign Person may be expressly and irrevocably expanded from time to time in accordance with this Deed (for example, if and when additional duty and/or land tax surcharge regimes in other States or Territories are introduced in the future) but cannot be revoked or amended so as to limit its scope.

Trust to Foreign Trust distributions



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- Care must be taken as some trust deeds with a 'more flexible' foreign exclusion clause may be considered a foreign trust under a deed with a 'more strict' foreign exclusion clause
- Trust A defines Foreign Persons to be persons who are a 'foreigner' under NSW Duties Act.
- Trust B defines Foreign Persons to include persons who are a 'foreigner' who 'would or might cause the Trust to be or become a foreign person or a foreign trust for the purposes of any other statute'.
- That is:
 - Trust A allows distributions to Australian citizens living overseas.
 - Trust B does not allow distributions to Australian citizens living overseas as it would cause Trust B to a foreign trust for FIRB.

Trust to Foreign Trust distributions



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- Under FIRB, a discretionary trust that can distribute to a foreign person (without restriction) is deemed to be a foreign trust
- Trust A is therefore considered a foreign trust to Trust B
- Trust B cannot make a distribution to Trust A
- Any such distribution would be a failed distribution
- Tip:
 - Having the same foreign exclusion clause aligned.
 - If there are different clauses, then you may only be able to further restrict as most foreign exclusion clauses are embedded in the trust deed.
 - Consider if foreign exclusion clauses extend from beneficiaries to trustees and principals/appointors.

Trust to Foreign Trust distributions



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- (c) Regardless of any other provision in this Deed, the Trustee must not exercise any Right under clause 18.1(a) or under the Applicable Law:
- (i) if any revocation, addition, release, deletion or variation would breach the rule against perpetuities;
 - (ii) if, as a result, any **Excluded Person** could or will become a Beneficiary, Appointor or Trustee of the Trust; or
 - (iii) in a way which is inconsistent with clause 18.3.

21.6 **Excluded Person not to be Trustee**

A Trustee may be any person or persons (not under a legal disability) except:

- (a) an **Excluded Person**; or
- (b) any person who is restricted or prohibited by the Applicable Law from being or becoming a Trustee.

21.7 **Office vacated**

A Trustee is removed from that office if the Trustee:

- (a) is or becomes an **Excluded Person**;

- (mm) **Gifts.** To make any donations, gifts or advances which the Trustee decides for any purpose or object. The Trustee may exercise this Right in favour of any person or to any association, institution, corporation or charity except an **Excluded Person**.

22.2 **Excluded Person not to be Appointor**

An Appointor or Alternative Appointor may be any person or persons (not under a legal disability) except an **Excluded Person**.

22.3 **Office vacated**

An Appointor or Alternative Appointor is removed from that office if that Appointor or Alternative Appointor:

- (a) is or becomes an **Excluded Person**;

- (f) **Powers of attorney.** To give proxies and powers of attorney (with or without power of substitution) and appoint representatives for voting or acting on behalf of the Trustee in relation to any part of the Trust Fund. Without limitation, the Trustee may empower its attorney to take any action and/or perform any act on behalf of the Trustee and to sign and execute any deed, agreement or document that the Trustee may lawfully do, including the exercise of any of the Trustee's Rights or Obligations and the execution of mortgage and security documents. The Trustee may in its absolute discretion, grant powers of attorney or proxies to any third party including any mortgagee, lender or financier, any creditor of the Trust or any other party who may have an interest in the Trust Fund, other than an **Excluded Person**.



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of the same provision, covenant, condition, easement, restriction and/or obligation, whether occurring prior or subsequent thereto. Anything contained in this Declaration to the contrary notwithstanding, WDPR (and/or its Affiliate(s) or Designee, as applicable) may enforce this Declaration and the terms, provisions, covenants and conditions herein by injunctive relief, and, in addition, may seek damages and all other rights and remedies available to WDPR (and/or its Affiliate(s) or Designee, as applicable), at law or in equity.

7. **TERM; ASSIGNMENT BY WDPR.**

7.1. **Term.** This Declaration shall be deemed effective as of the Effective Date and continue to be effective in perpetuity unless all or certain portions of the provisions of this Declaration are expressly terminated as provided elsewhere herein; provided, however, that if the perpetual term of this Declaration is deemed to violate the “Rule Against Perpetuities,” or any similar law or rule, this Declaration shall continue in effect until twenty one (21) years after the death of the last survivor of the descendants of King Charles III, King of England living as of the date of this Declaration. Notwithstanding the foregoing or anything to the contrary herein, this Declaration will terminate as of the date that none of WDPR or any of its Affiliates (or their respective successor entities) owns any real property within ten (10) miles of the RCID Properties.

Contact details

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